Supreme Court, U.S.
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No. 03-534

In The
Supreme Court of the United States
October Term, 2003

ELIZABETH FEASTER,

Petitioner,

v.

STATE OF FLORIDA, DEPARTMENT OF HEALTH, BOARD OF NURSING,

Respondent.

On Petition For A Writ of Certiorari To The District Court of Appeal, First District, State of Florida

RESPONDENT'S BRIEF IN OPPOSITION

CHARLES J. CRIST, JR.
Attorney General of Florida

LOUIS F. HUBENER
Chief Deputy Solicitor General
Office of the Attorney General
PL-01, The Capitol
Tallahassee, FL 32399
(850) 414-3300

CHRISTOPHER M. KISE
Solicitor General of Florida
Counsel of Record
Office of the Attorney General
PL-01, The Capitol
Tallahassee, FL 32399
(850) 414-3300

QUESTION PRESENTED

Whether the Eleventh Amendment bars suit under Title II of the Americans with Disabilities Act, 42 U.S.C. § 12131-12165, against the Florida Board of Nursing for discrimination against an applicant for a nursing license based upon the applicant's mental impairment.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE PETITION 3

I. NEITHER THE QUESTION PRESENTED NOR THE LIMITED ISSUE ARGUED TO THE FIRST DISTRICT COURT OF APPEAL WARRANTS THIS COURT'S REVIEW 3

CONCLUSION 7

APPENDIX

TABLE OF AUTHORITIES

CASES

Adams v. Robertson, 520 U.S. 83 (1997) 5

Alden v. Maine, 527 U.S. 706 (1999) 2,3

Alsbrook v. City of Maumelle, 184 F.3d 999
(8th Cir. 1979) (en banc), cert. dismissed,
529 U.S. 1001 (2000) 6

Asarco, Inc. v. Kadish, 490 U.S. 605 (1989) 4

Ass'n for Disabled Ams. Inc. v. Fla. Int'l Univ.,
178 F. Supp. 2d 1291 (S.D. Fla. 2001) 2,3

Board of Trustees of the University of Alabama
v. Garrett, 531 U.S. 356 (2001) 2,4,5,6

Campbell v. Louisiana, 523 U.S. 392 (1999) 5

Dare v. California, 191 F.3d 1167 (9th Cir. 1999),
cert. denied, 531 U.S. 1190 (2001) 6

Dep't of Highway Safety & Motor Vehicles v. Rendon,
832 So. 2d 141 (Fla. 3d DCA 2001) 3

Garcia v. S.U.N.Y. Health Sciences Center,
280 F.3d 98 (2d Cir. 2001) 6

Hason v. Medical Bd. of California, 279 F.3d 1167
(9th Cir. 2002) 6

Heath v. Alabama, 474 U.S. 82 (1985) 5

Illinois v. Gates, 462 U.S. 213 (1983) 5

Kiman v. New Hampshire Dep't of Corrections,
301 F.3d 13 (1st Cir. 2002) 6

Kimel v. State of Florida Board of Regents, 139 F.3d 1426
(11th Cir. 1998) 2,4,5

McGoldrick v. Campagnie Generale Transatlantique,
98 U.S. 430 (1940) 5

Pennhurst State School & Hosp. v. Halderman,
465 U.S. 89 (1984) 3

Popovich v. Cuyahaga County Court, 276 F.3d 808 (6th Cir.)
(en banc), cert. denied, 537 U.S. 812 (2002) 6

Reickenbacker v. Foster, 274 F.3d 974 (5th Cir. 2001) 6

State v. Dwyer, 332 So. 2d 333 (Fla. 1976) 4

Tennessee v. Lane, 325 F.3d 680 (6th Cir.), cert. granted,
123 S. Ct. 2622 (2003) 4,5,7

Thompson v. Colorado, 258 F.2d 124, amended
278 F.3d 1020 (10th Cir. 2001); cert. denied
535 U.S. 1077 (2002) 6

Titus v. State, 696 So. 2d 1257 (Fla. App. 3d Dist. 1997),
approved with opinion, 707 So. 2d 706 (Fla. 1998) 4

Walker v. Snyder, 213 F.3d 344 (7th Circ. 2000),
cert. denied, 531 U.S. 1190 (2001) 6

Wessel v. Glendening, 306 F.3d 203 (4th Cir. 2002) 6

STATUTES

§ 456.076, Fla. Stat. 1

UNITED STATES CODE

42 U.S.C. § 12131 1

42 U.S.C. § 12132 1

42 U.S.C. § 12202 4

OTHER AUTHORITIES

28 C.F.R. § 35.130 1

STATEMENT OF THE CASE

The petitioner, Elizabeth Feaster, filed a complaint in state circuit court seeking damages and injunctive relief under Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12131, et seq. The defendant was the Florida Department of Health, Board of Nursing ("Board").

Ms. Feaster alleged that in 1998 she suffered a "closed head injury" that resulted in "a mental impairment of loss of ability to perform tasks that measure attention such as examinations." Pet. App. 6. Nevertheless, Ms. Feaster started and completed a nursing program at Daytona Beach Community College, and thereafter took the state nursing licensure examination. Id. The complaint alleged that the "noisy and distracting" environment in which the examination was administered caused her to fail. Id. at 7. She then requested the Board to make "reasonable accommodation" for her impairment. The Board allegedly denied this request. Id.

According to the complaint, the Board then "reconsidered" her application and required that she undergo evaluation by the Intervention Project for Nurses, authorized by § 456.076, Fla. Stat., and appear before the Board to demonstrate her ability to practice nursing with reasonable skill and safety. Feaster alleges that this requirement subjected her to "being stigmatized as an 'impaired practitioner' within the nursing profession." Id. at 8.

Feaster claimed these actions discriminated against her on the basis of her disability in violation of 42 U.S.C. § 12132 and 28 C.F.R. § 35.130(6) and (8). Id. at 9. In Count I of the complaint Feaster sought a permanent injunction against the Board's discriminatory actions. In Count II she sought damages from the Board in an unspecified amount. Id. at 9-10.

The Board moved to dismiss the complaint on the ground that Title II of the ADA did not properly abrogate the State's sovereign immunity, and that Florida had not otherwise waived

its immunity to an ADA action in its own courts. Relying on Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356 (2001), and Alden v. Maine, 527 U.S. 706 (1999), the circuit court granted the Board's motion and dismissed the action. Pet. App. 2.

On appeal, Feaster's brief stated that the primary issue was whether the Board was "immune from Feaster's suit for damages under the ADA, Title II." R. App. 8. The argument focused only on the damages claim, not the count for injunctive relief, and amounted to nothing more than the contention that the Florida courts were bound by the decision of the Eleventh Circuit in Kimel v. State of Florida Board of Regents, 139 F.3d 1426 (11th Cir. 1998). The brief stated the single issue presented as follows:

I.

FLORIDA BOARD OF NURSING ("FBN")IS NOT IMMUNE FROM SUIT FOR DAMAGES UNDER TITLE II OF THE AMERICANS WITH DISABILITIES ACT.

A. This issue was previously decided in *Kimel v. State of Florida Board of Regents.*

B. *Board of Trustees of the University of Alabama v. Garrett* does not overrule *Kimel* in Title II cases.

C. Under stare decisis Florida trial courts must follow *Kimel's* holding that ADA abrogated the states' Eleventh Amendment immunity as to Title II.

R. App. 2.

In a per curiam decision the First District Court of Appeal affirmed the dismissal of Feaster's action, citing two recent Title II decisions, Ass'n for Disabled Ams. Inc. v. Fla. Int'l Univ., 178

F. Supp. 2d 1291 (S.D. Fla. 2001), and Dep't of Highway Safety & Motor Vehicles v. Rendon, 832 So. 2d 141 (Fla. 3d DCA 2001).

Feaster's petition for a writ of certiorari acknowledges there is now no issue as to the dismissal of her request for injunctive relief. Pet at. 5 n. 1. It asks the Court to consider whether the Eleventh Amendment bars her state court suit for damages against the Board for alleged discrimination based upon Feaster's mental impairment. Pet. at i.

REASONS FOR DENYING THE PETITION

I. NEITHER THE QUESTION PRESENTED NOR THE LIMITED ISSUE ARGUED TO THE FIRST DISTRICT COURT OF APPEAL WARRANTS THIS COURT'S REVIEW.

Petitioner asks this Court to decide whether the Eleventh Amendment bars her state court action for damages. Of course, neither of the lower courts so ruled, and the Board did not argue an Eleventh Amendment bar. The Eleventh Amendment bars a suit against an unconsenting State only in federal court. Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 98-100 (1984). The Board argued that Congress did not properly abrogate the States' sovereign immunity under its Fourteenth Amendment powers, and that petitioner's action was foreclosed under Alden v. Maine, 527 U.S. 706 (1999), because Florida had not waived its immunity to an ADA action in its own courts. Relying on Alden, the circuit court held that Florida's immunity barred the claim, and the First District Court of Appeal affirmed.

Even if petitioner means to present the question of whether Congress properly abrogated the States' sovereign immunity for

actions brought under Title II of the ADA, that is not precisely the issue presented and argued to the First District Court of Appeal. In that forum, petitioner simply contended that the Florida courts were bound by an earlier decision of the Eleventh Circuit in Kimel v. State of Florida Board of Regents, 139 F.3d 1426 (11th Cir. 1998), that supposedly ruled on an ADA Title II claim. See R. App. 1-16. That argument was doomed to fail because state courts, absent some claim of res judicata or collateral estoppel, are bound only by decisions of this Court, not the federal courts of appeals. See State v. Dwyer, 332 So. 2d 333 (Fla. 1976); Titus v. State, 696 So. 2d 1257, 1263 (Fla. App. 3d Dist. 1997), approved with opinion, 707 So. 2d 706 (Fla. 1998). See also Asarco, Inc. v. Kadish, 490 U.S. 605, 617 (1989) (state courts "possess the authority, absent a provision for exclusive federal jurisdiction, to render binding decisions that rest on their own interpretations of federal law"). Not surprisingly, the First District entered a per curiam affirmance.[1]

The petition thus suffers from two defects. The first is that there is no issue as to whether the Eleventh Amendment bars this state court action. What bars Ms. Feaster's action is Florida's immunity in its own courts. Second, although the question pending before this Court in Tennessee v. Lane, 325 F.3d 680 (6th Cir.), cert. granted, 123 S. Ct. 2622 (2003), is whether

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[1]Feaster's argument to the First District that Kimel ruled on Title II abrogation is insupportable. The Eleventh Circuit's decision in Kimel addressed both the Americans with Disabilities Act ("ADA") and the Age Discrimination in Employment Act ("ADEA"). See 139 F.2d 1426. The decision eschewed discussion of the facts and did not state whether the ADA claim arose under Title I or Title II. This Court addressed and affirmed only that part of the Eleventh Circuit's decision ruling on the ADEA. See 528 U.S. 62 (2000). In support of her Title II assertion, Feaster cited only the Eleventh's Circuit's reference to 42 U.S.C. § 12202, R. App. 8-9, but that section abrogates the States' immunity under both Title I and Title II. See Garrett, 531 U.S. at 364, citing 42 U.S.C. § 12202.

Congress properly abrogated the States' sovereign immunity pursuant to its powers under § 5 of the Fourteenth Amendment, the argument presented to the First District was simply that Kimel was binding on Florida courts, notwithstanding the decision in Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356 (2001), and the numerous decisions of federal courts of appeals applying Garrett and concluding that Title II did not validly abrogate the States' immunity. That limited argument was clearly wrong and does not merit this Court's review.

Because the Question Presented is neither appropriate for review nor, to the extent it can be restated, preserved for review, this Court should deny the writ. It is not the Court's practice to accept for review a claim that was not properly presented to the state court below:

> With 'very rare exceptions,' . . . we will not consider a petitioner's federal claim unless it was either addressed by or properly presented to the state court that rendered the decision we have been asked to review.

Campbell v. Louisiana, 523 U.S. 392, 403 (1998) (quoting Adams v. Robertson, 520 U.S. 83, 86 (1997) (per curiam) (in relevant part refusing to address the issue of petitioner's "fair-cross-section claim" because petitioner failed to show the issue was properly presented to the Louisiana appellate courts); see also Heath v. Alabama, 474 U.S. 82, 87 (1985); Illinois v. Gates, 462 U.S. 213, 218 (1983); McGoldrick v. Compagnie Generale Transatlantique, 309 U.S. 430, 434 (1940).

If the Question Presented can be rewritten to conform to that presented in Tennessee v. Lane, and that question is deemed preserved, then the Court may hold the petition until resolution of Tennessee v. Lane. It should be noted, however, that contrary to the representations of the petition, the decision below does not conflict with the decisions of four federal circuits. On the

question of abrogation, it conflicts only with decisions of the Ninth Circuit. See Hason v. Medical Bd. of California, 279 F.3d 1167 (9th Cir. 2002), citing Dare v. California, 191 F.3d 1167 (9th Cir. 1999), cert. denied, 531 U.S. 1190 (2001).[2]

Feaster did not allege that the actions of the Board were based on discriminatory animus, or that they violated her right to due process or any other specific constitutional right. Her complaint alleges the Board "discriminated" against her by denying special testing accommodations and proceeding to determine whether she could safely practice nursing despite her mental impairment. Such actions taken in the interest of protecting patients from injurious acts by impaired nurses would not violate the Fourteenth Amendment under the Court's reasoning in Garrett. See Garrett, 531 U.S. at 367 ("States are not required to make special accommodations for the disabled, so long as their actions toward such individuals are rational.").

Ms. Feaster thus alleged only a violation of the ADA, not of any constitutional right. Nor can it be inferred in the absence of

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[2]Decisions contrary to those of the Ninth Circuit are Wessel v. Glendening, 306 F.3d 203 (4th Cir. 2002); Reickenbacker v. Foster, 274 F.3d 974 (5th Cir. 2001); Walker v. Snyder, 213 F.3d 344 (7th Circ. 2000), cert. denied, 531 U.S. 1190 (2001); Alsbrook v. City of Maumelle, 184 F.3d 999 (8th Cir. 1979) (en banc), cert. dismissed, 529 U.S. 1001 (2000); Thompson v. Colorado, 258 F.2d 124, amended 278 F.3d 1020 (10th Cir. 2001); cert. denied, 535 U.S. 1077 (2002). The Second Circuit would allow a damages claim under Title II only on proof of discriminatory animus. See Garcia v. S.U.N.Y. Health Sciences Center, 280 F.3d 98 (2d Cir. 2001). The Sixth Circuit has held that Title II of the ADA cannot be sustained as an act that enforces the Equal Protection Clause, but may be read to enforce the Due Process Clause. See Popovich v. Cuyahaga County Court, 276 F.3d 808 (6th Cir.) (en banc), cert. denied, 537 U.S. 812 (2002). The First Circuit has held that a particular constitutional violation must be identified. See Kiman v. New Hampshire Dep't of Corrections, 301 F.3d 13, 30 (1st Cir. 2002).

specific allegations that the Board acted upon some animus towards Ms. Feaster because of her disability. The decision below is therefore consistent with the decisions of at least eight circuits.

Because the abrogation issue has been briefed in Tennessee v. Lane, the Board will not repeat the many reasons that would warrant affirmance of the decision below. These are fully elaborated in the brief submitted by Tennessee.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied. In the alternative, should the Court consider the Question Presented to be the same as that presented in Tennessee v. Lane, and that it is properly preserved, the petition should be held pending resolution of that case.

RESPECTFULLY SUBMITTED,

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

CHRISTOPHER M. KISE
SOLICITOR GENERAL
Fla. Bar. No. 0855545
Counsel of Record

LOUIS F. HUBENER
Chief Deputy Solicitor General
Fla. Bar No. 0140084

Office of the Attorney General
Suite PL-01, The Capitol
Tallahassee, FL 32399
(850) 414-3300
(850) 410-2672 (fax)

APPENDIX

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FIRST DISTRICT

Case no. 01-07361 CA

ELIZABETH FEASTER,
Appellant,

v.

STATE OF FLORIDA,
DEPARTMENT OF HEALTH,
BOARD OF NURSING,
Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

AMENDED INITIAL BRIEF OF APPELLANT

JAMES N. CHARLES, ESQUIRE
Florida Bar #611840
215 Celebration Place, Suite 500
Celebration, FL 34747
Telephone (321) 559-1008
Facsimile (321) 559-0126
COUNSEL FOR APPELLANT

TABLE OF CONTENTS

PAGES:

TABLE OF AUTHORITIES ii

STATEMENT OF CASE AND FACTS 1

SUMMARY OF ARGUMENT 4

ARGUMENT 5

I.

FLORIDA BOARD OF NURSING ("FBN") IS NOT IMMUNE FROM SUIT FOR DAMAGES UNDER TITLE II OF THE AMERICANS WITH DISABILITIES ACT.

A This issue was previously decided in *Kimel v. State of Florida Board of Regents*.

B. *Board of Trustees of the University of Alabama v. Garrett* does not overrule *Kimel* in Title II cases.

C. Under stare decisis Florida trial courts must follow *Kimel*'s holding that ADA abrogated the states' Eleventh Amendment immunity as to Title II.

..... 5

CONCLUSION 14

CERTIFICATE OF SERVICE 14

TABLE OF AUTHORITIES

STATUTES: PAGES:

§ 456.076, Fla. Stat., "Treatment programs for impaired practitioners." 3

42 U.S.C. 12202 6

CASES: PAGES:

Kimel v. State of Florida Board of Regents, 139 F.3d 1426 (11th Cir. 1998), *affirmed* 528 U.S. 62 (2000) 4,5

Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356 (2001) 4,6

Andrews v. Florida Parole Com'n., 768 So.2d 1257, 1260 (Fla. 1st DCA 2000), *rev. dism. As improvidently granted*, 791 So.2d 1093 (Fla. 2001) 5

Navedo v. Maloney, 172 F. Supp. 2d 276 (Mass. D. Sept. 28, 2001) 6

Mobile Oil Corp. v. Shevin, 354 So 2d 372 (Fla. 1977) 9

Ratner v. Arrington, 111 So. 2d 82 (Fla. 3rd Dist 1959) 9

Zorick v. Tynes, 372 So. 2d 133 (Fla. 1st DCA 1979) 9

Cadieux v. Cadieux. 75 So. 2d 700 (Fla. 1954) 9

Association for Disabled Americans v. Florida International University, 178 F. Supp. 2d 1291 (S.D. Fla. 2001) 10

Engineering Contractors of South Florida, Inc. v. Metropolitan Dade County, 122 F. 3d 895, 908 (11th Cir. 1999) 11

Wascura v. Carver, 169 F. 3d 683, 687 (11th Cir. 1999) . 12

Druid Hills Civic Association, Inc. v. The Federal Highway Administration, 772 F. 2d 700 (11th Cir. 1985) 12

Garrett v. University of Alabama at Birmingham Board of Trustees, 193 F.2d 1214 (11th Cir. 1999) 13

STATEMENT OF CASE AND FACTS

The appellant, Elizabeth Feaster ("Feaster"), is the plaintiff in a lawsuit against defendant, State of Florida, Department of Health, Board of Nursing ("FBN") for an action for damages and injunctive relief under Title II of the Americans with Disabilities Act of 1990 ("ADA"). (R, p. 1)[1]

In January 1999, Feaster started the Registered Nurse degree program at Daytona Beach Community College ("DBCC"). In accordance with the ADA, DBCC provided Feaster with special accommodations through their Student Disability Services. She required special accommodations due to the fact she suffered a closed head injury in 1998, which resulted in mental impairment of loss of ability to perform tasks that measure attention such as examinations. These accommodations included extra time for testing and assignments, private setting for testing, note taker during classroom lecture and taped test. Feaster graduated from the DBCC Nursing Program, receiving an A.S. degree with Honors. (R, p. 2)

Following Feaster's graduation from the DBCC Nursing Program, she applied to FBN for nursing licensure. She first took the licensure examination at the Sylvan Learning Center in Jacksonville. While she expected to take the licensure examination in a quiet room with few people taking the exam, the licensure examination was given in a room with a dozen people taking other exams and people coming in and out to test on the computers. The entire environment of the licensure examination was noisy and distracting, which caused Feaster to fail the exam. (R, p. 2)

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[1] (R, p. __) refers to a given page number in the Record on Appeal in this case.

Feaster subsequently applied to FBN for reasonable accommodation during the licensure examination. She supplied FBN with letters from a neurophsychologist, Dr.Pritchard, and the Chairperson of the DBCC Department of Nursing, Linda Miles. Dr. Pritchard stated in her letter that Feaster was "highly motivated." Ms. Miles stated in her letter that Ms. Feaster was an "exemplary student" in the program and would be an "asset to the nursing profession." (R, p. 3)

FBN refused to grant Feaster's request for reasonable accommodation during the licensure examination. (R, p. 3) Feaster can meet, with reasonable accommodation, the essential requirements for receiving the nursing license. (R, p. 4) FBN's response to Feaster's request was to sua sponte reconsider her application for licensure and determining that she must undergo an independent evaluation by the Intervention Project for Nurses ("IPN") to determine whether she is able to practice as a registered nurse with reasonable skill and safety and requiring her to appear before FBN and demonstrate her ability to practice with reasonable skill and safety. (R, p. 3)

The IPN program operates under § 456.076, Fla. Stat., "Treatment programs for impaired practitioners." The IPN program groups drug and alcohol abusers together with those having physical or mental impairments. As a result, individuals directed into the IPN program are stigmatized within the nursing profession. Consequently, FBN's requirement that Feaster undergo an evaluation in the IPN program subjects her to being stigmatized as an "impaired practitioner" within the nursing profession. (R, p. 4)

The Appellee filed a motion to dismiss the complaint. (R, p.10-12). The trial court entered an order granting defendant's motion to dismiss with prejudice. (R, p. 24-26) The trial court entered an order of dismissal with prejudice. (R, p. 32) Feaster filed a timely notice of appeal. (R, p. 27-30).

SUMMARY OF ARGUMENT

The primary issue in this appeal is whether FBN is immune from Feaster's suit for damages under the ADA, Title II. This issue was previously decided in *Kimel v. State of Florida Board of Regents*, 139 F.3d 1426 (11th Cir. 1998), *affirmed* 528 U. S. 62 (2000). In *Kimel*, the court held the State of Florida and its subdivisions are not immune from suit for damages under the ADA, Title II because Congress abrogated the sovereign immunity of the states when it enacted the ADA. *Id.* at 1433. The United States Supreme Court has not overruled *Kimel* in cases under Title II of the ADA. In *Board of Trustees of the University ofAlabama v. Garrett*, 531 U.S. 356 (2001), the Supreme Court held that Title I of the ADA does not abrogate the sovereign immunity of the states. However, the Court expressly declined to apply the rulings to Title II of the ADA.

Kimel remains binding precedent for this trial court and all other state or federal trial court within the jurisdiction of the Eleventh Circuit. In accordance with this precedent, it is error for this trial court and for the U. S. District Court in the Southern District of Florida to speculate as to the effect of *Garrett* as to Title II of the ADA. Therefore, the order granting defendant's motion to dismiss in this case must be reversed.

ARGUMENT

I.
FLORIDA BOARD OF NURSING ("FBN") IS NOT IMMUNE FROM SUIT FOR DAMAGES UNDER TITLE II OF THE AMERICANS WITH DISABILITIES ACT.

A. This issue was previously decided in *Kimel v. State of Florida Board of Regents.*

The primary issue in this appeal is whether FBN is immune from Feaster's suit for damages under the ADA, Title II. This issue was previously decided in *Kimel v. State of Florida Board of Regents*, 139 F. 3d 1426 (11th Cir. 1998), *affirmed* 528 U.S. 62 (2000). In *Kimel*, the court held the State of Florida and its subdivisions are not immune from suit for damages under the ADA, Title II, because Congress abrogated the sovereign immunity of the states when it enacted the ADA. *Id.* at 1433. The standard of review is de novo. *Andrews v. Florida Parole Com'n.*, 768 So.2d 1257, 1260 (Fla. 1st DCA 2000), *rev. dism. As improvidently granted,* 791 So.2d 1093 (Fla. 2001).

Kimel addressed the immunity of the Florida Department of Corrections from suit under Title II of the ADA. The court also addressed the issue of a state's immunity under the Age Discrimination in Employment Act ("ADEA"). The court held the ADEA did not abrogate the state's entitlement to immunity, but the ADA did. *Id.* The court stated as follows:

> In sharp contrast to the ADEA, the ADA does include a clear statement of intent to abrogate Eleventh Amendment immunity: "A State shall not be immune under the eleventh amendment..." 42 U.S.C. 12202.

The above-referenced section of the United States Code, 42 U.S.C. 12202 is a provision of Title II. Although the court does not expressly limit its application to Title II, the cited code section clarifies this is a Title II case. *See also Navedo v. Maloney*, 172 Fed. Supp. 2d 276, 288 (Mass. D. 2001) (Stating the 11th Circuit upheld the constitutionality of Title II of the ADA in *Kimel*).

B. *Board of Trustees of the University of Alabama v. Garrett* does not overrule *Kimel* in Title II cases.

The United States Supreme Court has not over [sic] *Kimel* in cases under Title II of the ADA. In *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), the Supreme Court held that Title I of the ADA does not abrogate the sovereign immunity of the states. However, the Court expressly declined to apply the ruling to Title II of the ADA. *Id.* at footnote 1.

The United States Supreme Court expressly stated in *Garrett* its opinion was not applicable to the issue of immunity under Title II of the ADA. The Supreme Court stated as follows:

> We decide here whether employees of the State of Alabama may recover money damages by reason of the State's failure to comply with the provisions of Title I of the Americans with Disabilities Act [full citation of Act omitted].n 1
>
> * * *
>
> n1. . . We are not disposed to decide the constitutional issue whether Title II which has somewhat different remedial provisions from

> Title I, is appropriate legislation under § 5 of the Fourteenth Amendment... To the extent the Court granted certiorari on the question whether respondents may sue their state employers for damages under Title II of the ADA... that portion of the writ is dismissed as improvidently granted. (Underline added).

The Court limited the effect of its ruling by expressly stating it was deciding the immunity issue under Title I of the ADA and was not deciding the issue under Title II. The court went even further by dismissing the writ of certiorari ("on the question whether respondents may sue their state employers for damages under Title II of the ADA."

The Supreme Court's express limitation of its ruling and its dismissal of the writ of certiorari as to questions under Title II of the ADA clearly show the error of the trial court in the instant case. The trial court dismissed Feaster's action based upon *Garrett*. Since Feaster's action is under Title II of the ADA, the dismissal should be reversed.

The current state of the law of sovereign immunity under Title II of the ADA after *Garrett* was analyzed in *Navedo v. Maloney, supra*. The court stated as follows:

> Moreover, the Garrett Court was explicit about why it declined to reach Title II: The troubling "lack of findings" in the legislative record with regard to discrimination based on disability by state employers was not mirrored in other areas, such as public services. Id. at 966 & n.7 (concluding that the "overwhelming" majority of accounts of disability-based discrimination in the legislative record :pertain to alleged discrimination by the States in the provision of

> public services and public accommodations, which are addressed in Titles II and III of the A.D.A."). Thus, even as invalidated Title I's abrogation of sovereign immunity, the Supreme Court recognized that Title II rested on a far different base of legislative findings, and declined to include it within the sweep of Garrett's holding. (Underline added.)

The court went on to survey the rulings of the Federal circuit courts of appeal. It noted that the Fifth, Ninth and Eleventh Circuits and numerous district courts in the other circuits have upheld the constitutionality of the derogation of immunity under Title II of the ADA. *Id.* at ____. The court followed the Supreme Court's reasoning in *Garrett* for declining to apply its ruling to Title II and the preponderance of federal case law to decide that Title II of the ADA abrogates the Eleventh Amendment immunity of the states from suit. *Id.* at ____,

Navedo demonstrates that *Kimel* continues to provide precedent on the issue of immunity under Title II even after *Garrett*. Although the federal courts across the country are split, the issue is settled within the boundaries of the 11th Circuit Court of Appeals and *Kimel* provides the controlling standard.

C. Under stare decisis, Florida trial courts must follow *Kimel's* holding that ADA aborogated [sic] the states' Eleventh Amendment immunity as to Title II.

If the Florida Attorney General in *Kimel* had not stipulated to dismiss the petition for certiorari review in the United States Supreme Court, the Court would have probably directly ruled on the issue of Eleventh Amendment immunity

under Title II. Since it did not, the Eleventh Circuit's holding in *Kimel* is still controlling authority as to Title II of the ADA.

Furthermore, the Eleventh Circuit's holding in *Kimel* is binding precedent for Florida trial courts. State courts are bound by federal court determinations of federal law questions. *See Mobile Oil Corp. v. Shevin*, 354 So. 2d 372 (Fla. 1977); *Ratner v; Arrington*, 111 So. 2d 82 (Fla. 3rd Dist 1959); *Zorick v. Tynes*, 372 So. 2d 133 (Fla. 1st DCA 1979); *Cadieux v. Cadieux*, 75 So. 2d 700 (Fla. 1954). Accordingly, the court in the instant case must follow *Kimel* and deny FNB's motion to dismiss.

The trial court in the instant case also relied upon a case that was improperly decided, *Association for Disabled Americans v. Florida International University*, 178 F. Supp. 2d 1291 (S.D. Fla. 2001). The court ignored *Kimel* and applied *Garrett* to a ADA Title II case. The error in that case should not be repeated in the instant case.

The decisions cited below leave absolutely no doubt that *Kimel* remains binding precedent for this trial court and all other state or federal trial court within the jurisdiction of the Eleventh Circuit. In accordance with this precedent, it is error for this trial court and for the U.S. District Court in the Southern District of Florida to speculate as to the effect of *Garrett* as to Title II of the ADA. Therefore, the order granting defendant's motion to dismiss in this case must be reversed.

The enclosed decisions clearly show the proper application of stare decisis in this case. In each of the decisions cited below, a party made the same argument the Florida Board of Nursing makes in this case-that case precedent of the Eleventh Circuit should be overruled and disregard [sic] in light of subsequent United States Supreme Court decisions that seemed to undermine the validity of the circuit's existing precedent.

In each of the decisions cited below, the Eleventh Circuit resoundingly rejects the arguments for overruling its case precedent. The rulings demonstrate that case precedent of the Eleventh Circuit must be strictly adhered to unless it is expressly overruled by itself sitting en banc or the United States Supreme Court.

In *Engineering Contractors of South Florida, Inc. v. Metropolitan Dade County*, 122 F. 3d 895, 908 (11th Cir. 1997), the court held that it was not at liberty to disregard binding precedent of the Supreme Court that was closely on point to the issue before it even though a subsequent Supreme Court decision supported speculation that the Supreme Court would overrule the precedent unless the Supreme Court expressly overruled its previous opinion. The court stated as follows:

> Even if the VMI case portends a major change in the Supreme Court's approach to gender classifications, "we are not at liberty to disregard binding case law that is so closely on point and has been only weakened, rather than directly overruled, by the Supreme Court." *Florida League of Prof'l Lobbyists v. Meggs*, 87 F. 3d 457, 462 (11th Cir. 1996). The Supreme Court has cautioned us that "if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." (Underline added.)

The Eleventh Circuit extends its strict adherence to precedent to its own decisions. Under the court's "prior precedent rule," the panel of justices in *Wascura v. Carver*, 169 F. 3d 683, 687 (11th Cir. 1999), held that it was bound to follow the decision of a prior panel of the court even when it was convinced the prior decision was wrong. The court held as follows:

> Wascura argues that the reasoning of *Welch* [prior 11th Circuit decision] is unclear and inadequate to support its holding. We have no occasion to pass on that criticism, because we are bound by the Welch decision regardless of whether we agree with it. See, e.g., *Chambers v. Thompson*, 150 F.3d 1324, 1326 (11th Cir. 1998) ("We are bound to follow a prior panel or en banc holding, except where that holding has been overruled or undermined to the point of abrogation by a subsequent en banc or Supreme Court decision."); *United States v. Steele,* 147 F.3d 1316, 1317-18 (11th Cir. 1998) (en banc) ("Under our prior precedent rule, a panel cannot overrule a prior one's holding even though convinced it is wrong."). (Underline added.)

Another example of the prior precedent rule is *Druid Hills Civic Association, Inc. v. The Federal Highway Administration*, 772 F.2d 700 (11th Cir. 1985). In that case, one of the parties argued that a Ninth Circuit decision was more consistent with a Supreme Court decision than the precedent of the Eleventh Circuit. The court held that even if this were so, it was required to follow its existing precedent unless it is expressly overruled en banc or by the Supreme Court. The court stated as follows:

> Even were we to agree that *Stop H-3 Association* [9th Circuit decision] offers a view more

> consistent with *Overton Park* [U.S. Supreme Court decision], we would still be bound by our decision in *LES II.* See *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (en banc). Only this court sitting en banc or the United States Supreme Court can overrule precedent binding on this court.

The above decisions demonstrate the strict adherence to precedent that is required by all courts under *stare decisis*. There is no opportunity for a lower court to depart from precedent unless a higher court expressly overrules the precedent.

The trial courts are not at liberty to disregard the Eleventh Circuit's binding precedent in *Kimel*. Since *Garrett* did not expressly overrule *Kimel*, the trial court must follow *Kimel* in this case.

The application of the above ruling to this case can be further illustrated by noting that under the Eleventh Circuit's prior precedent rule, if this case came before a panel of the Eleventh Circuit, the panel would be bound to follow *Kimel* even if the panel believed *Kimel* was wrong. Since *Kimel* would bind a panel of the Eleventh Circuit in reviewing this case, how can a trial court not be so bound?

This analysis can also be applied to the 11th Circuit's decision that was reversed by the United States Supreme Court in *Garrett, Garrett v. University of Alabama at Birmingham Board of Trustees*, 193 F. 2d 1214 (11th Cir. 1999), where the court stated, "We, of course, are bound by the decision of the Court in *Kimel.*" Since the Supreme Court dismissed the writ of certiorari in *Garrett* as to the ADA Title II, the 11th Circuit and other federal and state courts within its jurisdiction continue to be bound by the decision in *Kimel.*

CONCLUSION

Based upon the authority of the above cases, Elizabeth Feaster respectfully requests this court to reverse the trial court order dismissing her action against the Florida Board of Nursing under Title II of the ADA.

JAMES N. CHARLES, ESQUIRE
Florida Bar #611840
215 Celebration Place, Suite 500
Celebration, FL 34747
Telephone (321) 559-1008
Facsimile (321) 559-1026
COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing has been furnished by facsimile and U.S. Mail delivery to J. B. Donnelly, Esquire, and Louis F. Hubener, Esquire, Deputy Solicitor General, Office of the Attorney General, PL-01, The Capitol, Tallahassee, FL 32399-1050, this October 18, 2002.

Attorney